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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re KAYLA M., a Person Coming Under the
Juvenile Court Law.

MADERA COUNTY DEPARTMENT OF
SOCIAL SERVICES/CHILD WELFARE
SERVICES,

Plaintiff and Respondent,

v.

K.E. et al.,

Defendants and Respondents;

KAYLA M.,

Minor and Appellant.

F063969

(Super. Ct. No. MJP015482)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. Thomas L. Bender, Judge.

S. Lynne Klein, under appointment by the Court of Appeal, for Minor and Appellant.

Douglas W. Nelson, County Counsel, and Miranda P. Neal, Deputy County Counsel, for Plaintiff and Respondent

*Before Wiseman, Acting P.J., Levy, J. and Cornell, J.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Respondent K.E.

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Appellant Kayla M. (a seven-year-old minor) is the daughter of Shawn and K.E. Kayla was detained in 2004 because of K.E.'s drug use and spent the ensuing years in guardianship with her maternal grandparents, Mr. and Mrs. E. Although Shawn initially struggled to overcome his personal problems, by 2010 his life was stable and he developed a relationship with Kayla through frequent contact and regular visitation. As a result, at a 2011 permanency planning hearing (Welf. & Inst. Code § 366.26),¹ the juvenile court refused to terminate Shawn's parental rights in favor of adoption by Mr. and Mrs. E. We affirm that decision.²

PROCEDURAL AND FACTUAL SUMMARY

In December 2004, the juvenile court ordered then five-week-old Kayla removed from the custody of her parents, K.E. and Shawn, after sustaining allegations that K.E. exposed Kayla to methamphetamine in utero. The juvenile court ordered reunification services for both parents, which included drug testing. At seven weeks, Kayla was placed with her maternal grandparents, Mr. and Mrs. E.

In August 2005, the juvenile court terminated reunification services for both parents for noncompliance and, at a section 366.26 hearing the following December, appointed Mr. and Mrs. E. as Kayla's legal guardians. Mrs. E. chose guardianship over adoption in the hope that K.E. would attain sobriety and eventually resume custody of

¹All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

²Kayla's appeal is unopposed. Respondents K.E. and the Madera County Department of Social Services, through their attorneys, advised this court that they concur with Kayla's position and declined to file opposition briefs. As he was unrepresented on appeal, this court served Shawn by mail with copies of Kayla's opening brief and the letters from respondents and granted him leave to file a respondent's brief. He declined to do so.

Kayla. In ordering guardianship, the juvenile court did not order visits for Shawn. It ordered visits for K.E. to be arranged between her and Mr. and Mrs. E.

Over the years, Mrs. E. updated the juvenile court on Kayla's status. In April 2007, she reported that Kayla had a one-year-old sister Alana (also Shawn's daughter) who was temporarily staying with them and that K.E. was still using drugs. She said "Kayla is my child" and said she and Mr. E. would be willing to start adoption proceedings any time. She also reported that Shawn started visiting Kayla in January 2007 and visited her once a month. In 2009, Mrs. E. reported that K.E., Alana, and K.E.'s one-year-old son Richard had been living in her home since November 2008. She said that even though Shawn and K.E. were part of Kayla's life, Kayla considered Mr. and Mrs. E. as her mother and father. In 2010, Mrs. E. reported that Alana and Kayla lived with her and that K.E. visited Kayla unsupervised for four hours a week. Shawn visited Kayla unsupervised once a week for five to six hours and occasionally overnight.

In December 2010, Shawn's attorney filed a section 388 petition³ (hereafter 388 petition) asking the juvenile court to terminate guardianship and place Kayla in Shawn's care. Shawn claimed that he turned his life around, citing his completion of a substance abuse program in 2007, his four-year employment at a home security company, and the purchase of a three-bedroom home.

In January 2011, Kayla, through her attorney, filed a 388 petition asking the juvenile court to suspend Shawn's overnight visitation and order that visitation be supervised. The petition stated that Shawn and his live-in girlfriend told Kayla that Mr. and Mrs. E. were going to die, and when they did she would live with them. The petition

³Section 388 allows the parent or any person having an interest in a child who is a dependent of the juvenile court to petition the court to change, modify or set aside any order upon grounds of change of circumstance or new evidence. (§ 388, subd. (a).) In addition to showing that there has been a change of circumstances, the moving party must also show that the proposed change of order promotes the best interest of the child. (§ 388, subd. (b); *In re Marilyn H.* (1993) 5 Cal.4th 295, 3089-309.)

further stated that Kayla was traumatized by the comments and, as a result, she was evaluated by a doctor for stomach problems caused by stress, would no longer sleep alone, and was in need of counseling.

In February 2011, Mr. and Mrs. E.'s attorney filed a 388 petition asking the juvenile court to change Kayla's permanent plan from guardianship to adoption. They claimed that Shawn's effort to regain custody of Kayla arose after only sporadic involvement in her life, and the possibility of being uprooted had caused her emotional distress.

In February 2011, social worker Allyson Cookson interviewed Mr. and Mrs. E., K.E., Shawn, and Kayla and advised the juvenile court of her findings in a report for the section 388 hearing. Mrs. E. told Cookson that Shawn regularly visited Kayla on Sunday afternoons and had her stay overnight once a month but that he did not provide any financial support. She said she was concerned about Kayla's emotional health, explaining that Kayla suffered stomach pain when it was time for Shawn to call her at night. The stomach pain was so severe that Kayla doubled over and cried. She took Kayla to the doctor who found no medical basis for her discomfort.

Mr. and Mrs. E. told Cookson that Shawn began demanding more time with Kayla after he met his girlfriend in the summer of 2010. Kayla told Mr. and Mrs. E. that Shawn was getting married and that he was going to buy a house with a big yard. He told Kayla that Mr. and Mrs. E. were old and were going to die and that she would live with him. Mr. and Mrs. E. stated that they wanted to adopt Kayla and Alana and would permit Shawn to continue to visit Kayla if they were allowed to adopt her.

Shawn told Cookson that prior to 2006, he was homeless and addicted to methamphetamine. However, in July 2006, he moved in with a sober friend and began to regularly attend Narcotics Anonymous meetings and participate in drug treatment programs. All the while, he kept in touch with Kayla. In March 2007, he was employed by a home security company, and in December 2010 he obtained a home with a room

reserved for Kayla. He also attempted to more fully participate in Kayla's life by attending her school functions, changing his work schedule so Kayla could stay with him instead of daycare, and offered Mr. and Mrs. E. money. However, he said that they made it difficult for him and refused his offers of money and requests for extra time with Kayla. He said he waited to file for custody of her because he wanted to be sure he was stable. He denied telling Kayla that Mr. and Mrs. E. were going to die.

Kayla told Cookson that she has three homes: one with her grandparents, one with her father, and one with her mother. She said she always had food to eat and clean clothes to wear at all three homes. She felt safe at all three homes and no one made her feel uncomfortable or scared. She denied telling Mr. and Mrs. E. that Shawn was getting married and that she would have to live with him, but confirmed that Shawn told her Mr. and Mrs. E. were old and going to die and that she would live with him. When asked, she said, "Yes and it made me cry." When asked about her stomach problems, she said she was constipated but that she ate dried plums and it was resolved. When asked if she would like to spend more time with her father, she said "Sometimes." According to Cookson, Kayla did not speak negatively about anyone in her family and seemed to feel secure in each home.

Cookson concluded, based on her interviews, that Shawn was capable of benefitting from reunification services and reuniting with Kayla. Consequently, in her report to the juvenile court, she recommended that the court provide him reunification services.

In March 2011, K.E.'s attorney filed a 388 petition asking the juvenile court to terminate the guardianship and order reunification services for her.

In April 2011, county counsel filed points and authorities supporting Shawn's request for termination of the guardianship but opposing his request that Kayla be placed in his custody. County counsel recommended against immediately placing Kayla with

either parent, but recommended that the juvenile court provide both parents reunification services and increased visitation with a view toward returning Kayla to their custody.

In May 2011, the juvenile court convened a contested hearing on the 388 petitions filed by Shawn, K.E., Kayla and Mr. and Mrs. E.; the parties agreed that the court would hear their petitions separately in that order. During the hearing on the petitions, Shawn testified that for the previous two and a half years, he had Kayla and Alana three Sundays each month from 12:00 until 7:30 p.m. On a typical Sunday afternoon, Shawn and his girlfriend ate out with Kayla and Alana and returned to his house where the girls played with the animals and played dress-up. Later, the girls helped prepare dinner and they all ate together before Shawn returned them to Mr. and Mrs. E. Shawn also testified that he and Kayla had a good relationship and that she called him “Daddy.” He testified that in July and August of 2010, he went to Kayla and Alana’s gymnastics class and in August 2010, he went to the girls’ school and met their teachers. In September 2010, he went to their gymnastics class and to their soccer games. In October 2010, he dropped off cupcakes for Kayla’s birthday at her school and that same month attended a soccer game and a Halloween parade. In November and December 2010, he attended the girls’ soccer game. In January 2011, he attended an awards ceremony for Kayla. He said he wanted more contact with Kayla but Mr. and Mrs. E. would not allow it.

Mrs. E. testified that prior to July 2010, she and Shawn were very cooperative with each other, however, he began to demand more visitation and inserted himself more into Kayla’s affairs. For example, he had his name added as an emergency contact in her school file. Mrs. E. felt threatened by Shawn’s actions as she believed that Shawn was undermining the guardianship, so she filed the 388 petition.

After two days of testimony, the juvenile court denied Shawn’s 388 petition, after which K.E. withdrew her petition. The juvenile court reinstated dependency and set a section 366.26 hearing to decide whether to maintain the guardianship or select a

permanent plan of adoption. The parties stipulated that the evidence presented at the section 388 hearing could be considered at the section 366.26 hearing.

In its report for the section 366.26 hearing, the California Department of Social Services (department) informed the juvenile court that Kayla was adoptable and that Mr. and Mrs. E. were suitable for adoption. The department also advised the court that Mr. and Mrs. E. were in the process of adopting Alana and that Kayla wanted to remain with them and be adopted by them. Asked what adoption meant to her, Kayla responded, ““Oh, it’s a good word. Because if me and my sister are adopted we will be happy and safe and know that we are loved.”” The department recommended that the juvenile court terminate Shawn and K.E.’s parental rights and order a permanent plan of adoption for Kayla. K.E. did not contest the department’s recommendation.

In November 2011, the juvenile court convened the contested section 366.26 hearing. Shawn testified that he had been regularly visiting Kayla for the past six years. He said that during their visits they went to the park and ate at restaurants, and he read books to her. They played games on the television, colored, and did her math homework.

At the conclusion of the hearing, the juvenile court found that Kayla was adoptable but that terminating Shawn’s parental rights would be detrimental under section 366.26, subdivision (c)(1)(B)(i) because he regularly visited her and Kayla would benefit from continuing a relationship with him. The juvenile court stated:

“You have to look at a number of factors [in determining whether Kayla would benefit from continuing her relationship with Shawn] You have to look at the strength and quality of the relationship, if severing would deprive Kayla of substantial positive emotional attachment, such that she would be harmed. Looking at her age, looking at the positive/negative interaction, the child’s needs and in looking at the evidence and applying the law to it, I think that Kayla would benefit from continuing a relationship with her father. [The evidence has shown] that there has been some negative interaction, but from what I’ve read and heard is that there’s been more positive than negative, at least in my mind.”

The juvenile court selected guardianship as the permanent plan and ordered that Kayla remain with Mr. and Mrs. E. The court continued the hearing to finalize a visitation plan. This appeal ensued.

DISCUSSION

The Beneficial Relationship Exception

Kayla contends the juvenile court erred in applying section 366.26, subdivision (c)(1)(B)(i), often called the beneficial relationship exception to adoption, because she claims Shawn’s relationship to her was not that of a parent and child, which the statute protects, but rather of a “friendly visitor or friendly nonparent relative, such as an uncle.” Thus, she further contends the juvenile court abused its discretion in selecting guardianship as her permanent plan rather than the preferred plan of adoption. We disagree.

A. Legal Principles

At the permanency planning hearing, the juvenile court must select adoption as the permanent plan for an adoptable child and terminate parental rights unless the court finds “a compelling reason for determining that termination would be detrimental to the child” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The party seeking to establish the existence of the beneficial relationship bears the burden of proof. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) “To meet the burden of proving the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child. [Citation.]” (*Ibid.*)

“When applying the beneficial parent-child relationship exception, the court balances the strength and quality of the parent-child relationship in a tenuous placement against the security and sense of belonging that a stable family would confer on the child. If severing the existing parental

relationship would deprive the child of ‘a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ [Citation.]” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1234-1235.)

“The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child’s particular needs. [Citation.] While the exact nature of the kind of parent/child relationship which must exist to trigger the application of the statutory exception to terminating parental rights is not defined in the statute, the relationship must be such that the child would suffer detriment from its termination. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467, fn. omitted.)

B. Standard of Review

On a challenge to the sufficiency of the evidence to support the juvenile court’s finding that a beneficial relationship under subdivision (c)(1)(B)(i) of section 366.26 exists, we apply the substantial evidence test. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1527.)

“Under this test, “we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment ‘In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing.*’ [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.” [Citation.]” (*Ibid.*)

We apply the abuse of discretion standard to whether the existence of the relationship constitutes a compelling reason for determining that termination of parental rights would be detrimental. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315 (*Bailey J.*))

Having reviewed the record as summarized above, we conclude that the juvenile court did not abuse its discretion in this case as we now explain.

C. Application

1. *Benefit from continuing the relationship*

It is undisputed that Shawn maintained regular visitation and contact with Kayla. The question is whether there is substantial evidence that Kayla would benefit from continuing her relationship with Shawn. According to the testimony, Kayla knew Shawn as her “Daddy” and considered his home her home. She regularly visited him at his home where she played with her sister and half brother and shared in family meals and routine. Shawn celebrated special occasions with Kayla and assumed a parental role at her school by making himself an emergency contact, meeting Kayla’s teacher, and helping her with her homework. He also attended her extracurricular activities such as gymnastics, soccer, and school functions. In light of such evidence, the juvenile court could find that Shawn had assumed a parental role that benefitted Kayla.

Kayla contends that Shawn’s relationship with her is not parental. To that end, she likens her case to *Bailey J.*, *supra*, 189 Cal.App.4th 1308 in which the juvenile court’s finding that a beneficial relationship did not exist was affirmed. (*Id.* at p. 1316.) In our view, *Bailey J.*, though factually similar, is distinguishable.

In *Bailey J.*, the child, Bailey, like Kayla, was detained as a newborn and placed in foster care where he bonded with his caregiver. (189 Cal.App.4th at pp. 1312-1313.) Meanwhile, his mother participated in reunification services, which were terminated after 12 months. (*Id.* at p. 1312.) At the section 366.26 hearing, the juvenile court terminated the mother’s parental rights. (*Bailey J.*, *supra*, at p. 1313.) At the time, Bailey was one month shy of being two years old. At the hearing, the mother argued that the beneficial relationship exception to adoption applied and that it would be detrimental to terminate her parental rights. (*Ibid.*) She testified that she regularly visited Bailey once a week for eight hours, during which they had breakfast, ran errands, played in the yard, watched movies, and did the laundry. (*Id.* at p. 1316.) She said Bailey was excited to see her and called her “mommy.” (*Ibid.*) The juvenile court found that the mother maintained

regular visitation but noted that it had always been supervised. (*Id.* at p. 1313.) The juvenile court did not find that the mother and Bailey shared a beneficial relationship and selected adoption as Bailey's permanent plan. (*Ibid.*)

We find *Bailey J.* distinguishable in one key aspect. Bailey was a toddler when the juvenile court severed his mother's parental rights. In contrast, Kayla is seven years old. Consequently, she has much more awareness of the importance of her biological connection to Shawn, and their relationship is much broader by virtue of her age and the many and varied experiences she and Shawn have shared as father and daughter. Thus *Bailey J.* is unpersuasive, and we affirm the juvenile court's finding that Kayla would benefit from continuing her relationship with Shawn.

2. *Termination would be detrimental to the child*

Having affirmed the juvenile court's beneficial relationship finding, the question becomes whether it nevertheless abused its discretion in finding that Shawn and Kayla's relationship constituted a "compelling reason" for finding that adoption would be detrimental to Kayla. As the one bearing the burden of proof on appeal, Kayla must establish that the juvenile court in so finding abused its discretion. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) We conclude Kayla has failed to meet her burden.

In weighing the detrimental impact of severing Kayla's relationship with Shawn against the benefit of adoption, the juvenile court determined that Kayla's age and overall positive quality of her interaction with him weighed more heavily in favor of preserving that relationship than severing it through adoption. It did so even though Kayla lived with Mr. and Mrs. E. virtually her entire life and wanted to be adopted by them. Implicit in the juvenile court's ruling is the recognition that as a child matures, the child's relationship with the biological parent conveys intrinsic benefits which are worth

preserving. A case can be made for the termination of Shawn's parental rights, given the strong statutory preference for adoption and Kayla's need for a stable home. Nevertheless, we find no abuse of discretion in the juvenile court's decision.

DISPOSITION

The judgment is affirmed.